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80-1813

No.

In The

Supreme Court of the United States

October Term, 1980

OREST T. DUBNO, Commisioner of Revenue Services
of the State of Connecticut, et al,
Petitioner

vs.

MOBIL OIL CORPORATION, et al.,
Respondent

CARL R. AJELLO, Attorney General
of the State of Connecticut, et al,
Petitioner

vs.

TEXACO INC., et al
Respondent

ELLA T. GRASSO, Governor of the State of Connecticut, et al
Petitioner

vs.

AMERADA HESS CORPORATION
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 539 — September Term, 1980
Argued October 30, 1980 — Decided January 28, 1981
Docket No. 80-7677

MOBIL OIL CORP., AMOCO OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, and SUN OIL COMPANY OF PENNSYLVANIA, ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC., EXXON CORPORATION and SHELL OIL COMPANY,

Plaintiffs-Appellees,

— against —

OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut,

Defendants-Appellants.

TEXACO INC., a Delaware Corporation,

Plaintiff-Appellee,

— against —

CARL R. AJELLO, Attorney General of the State of Connecticut
OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut,

Defendants-Appellants.

AMERADA HESS CORPORATION,

Plaintiff-Appellee,

— against —

ELLA T. GRASSO, Governor of the State of Connecticut
OREST T. DUBNO, Commissioner of Revenue Services of the State of Connecticut
ANTHONY V. MILANO, Secretary of the Office of Policy and Management of the State of Connecticut,

Defendants-Appellants.

Before MULLIGAN and VAN GRAAFEILAND, Circuit Judges, and WERKER, District Judge.*

Appeal from an order of the United States District Court for the District of Connecticut, Judge M. Joseph Blumenfeld, declaring the anti-passthrough provision of Connecticut's tax upon the gross earnings of integrated oil companies derived from the sale of petroleum products in the state to be preempted by the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 et seq. and the Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83.

Affirmed as to the inapplicability of the Tax Injunction Act, 28 U.S.C. § 1341, dismissed as to the preemption and abstention issues.

WILLIAM E. GLYNN, Hartford, Conn. (Day, Berry & Howard, Hartford, Conn., Richard M. Reynolds, Allan B. Taylor, J. Bruce Boisture, of counsel) for Plaintiffs-Appellees.

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*United States District Judge for the Southern District of New York, sitting by designation.

FRANCIS J. McNAMARA, JR., Stamford, Conn. (Cummings & Lockwood, Stamford, Conn., Eric Watt Wiechmann, Joseph D. Magri, of counsel) for Plaintiff-Appellee Texaco, Inc.

CAPLIN & DRYSDALE, Washington, D.C. (Robert H. Elliott, Myron C. Baum, Albert G. Lauber, Jr., Washington, D.C., and SACHS, SACHS, DELANEY & SACHS, Milford, Conn., Arthur S. Sachs, Milford, Conn., of counsel) for Plaintiff-Appelleee Amerada Hess Corporation.

PETER W. GILLIES, Assistant Attorney General, Hartford, Conn. (Carl R. Ajello, Attorney General, Richard K. Greenberg, Paul M. Scimonelli, Ralph G. Murphy, Robert L. Klein, William B. Gundling, Assistant Attorneys General, Hartford, Conn., of counsel) for Defendants-Appellants.

MULLIGAN, Circuit Judge

On April 11, 1980, Conn. Publ. Act. No. 80-71 (Conn. Act) was signed into law and it became effective July 1, 1980. Section 1 of the Act imposes a 2% tax on the gross earnings derived by integrated petroleum companies from the sales of petroleum products in the State of Connecticut. As in the companion New York case decided today, *Mobil Oil Corp.* v. *Tully,* No. 80-7785, slip op. _____ (2d Cir.), the Connecticut legislature intended that the burden of the tax would be borne by the oil companies and not the Connecticut purchasers of oil products. Conn. Act § 13(a). Thus, in Section 13(b) of the Act (the anti-passthrough provision), the legislature provided that:

> [n]o petroleum company subject to the tax imposed under section 1 of this act shall raise its posted wholesale rack price in Connecticut for any petroleum product exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) by an amount higher than the average amount by which such company

> raises its wholesale rack price for such product in all ports on the eastern coast of the United States.

The Connecticut anti-passthrough provision differs from the New York provision in several respects. The Connecticut provision applies only to the prices of those petroleum products "exempt" from the EPAA whereas the New York provision was not so limited. In addition, oil companies can raise the price of "exempt" petroleum products in Connecticut as long as the companies similarly raise the prices in the other east coast states in which they sell their products. The New York provision, on the other hand, constituted an absolute ban on price rises based upon the gross receipts tax in New York. Finally, the Connecticut legislature did not rest the validity of the entire tax act upon the viability of Section 13(b). Rather, in Section 15 of the Act, the legislature specifically provided that:

> [i]f any section, part, clause or phrase in sections 1 through 16, inclusive, of this act, is for any reason held to be invalid or unconstitutional, sections, parts, clauses and phrases in said sections not held to be invalid or unconstitutional shall not be affected and shall remain in full force and effect.

None of these differences, however, is significant to the resolution of this case.

The plaintiffs, eleven oil companies subject to the tax and anti-passthrough provision, brought this action seeking declaratory and injunctive relief in the District Court for the District of Connecticut. The oil companies argued that the anti-passthrough provision violated both the Due Process and Interstate Commerce clauses of the United States Constitution. In addition, the companies argued that the provision was in conflict with the EPAA and the Federal Mandatory Petroleum Price Regulations and was, therefore, preempted by the Supremacy Clause of the United States Constitution. The defendants-appellants, the Governor of Connecticut, Connecticut Attorney General, Connecticut Commissioner of Revenue Services and

Connecticut Secretary of the Office of Policy and Management, moved to dismiss the action for want of federal jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 as well as the doctrine of abstention, and the plaintiffs-appellees moved for summary judgment.

Judge M. Joseph Blumenfeld, in a July 9, 1980 memorandum of decision impliedly denied the defendants' motion to dismiss and granted the plaintiffs-appellees' motion for summary judgment. As in the New York case, Judge Blumenfeld limited his decision to declaring that the anti-passthrough provision was a price control measure and was therefore preempted by the EPAA and the regulations issued thereunder. The opinion is reported at 492 F. Supp. 1004 (D. Conn. 1980).

The appellant state officers appeal from the adverse rulings of Judge Blumenfeld on their motion to dismiss and on the plaintiffs appellees' motion for summary judgment. The oil companies have moved before this court to dismiss this appeal in its entirety arguing that exclusive jurisdiction over this appeal is vested in the Temporary Emergency Court of Appeals (TECA) by virtue of 15 U.S.C. § 754(a) (1).

I.

This court in *Mobil Oil Corp.* v. *Tully, supra,* has today decided the very same questions presented in this companion case. Thus, no further discussion of this court's jurisdiction is required. Judge Blumenfeld held that Section 13(a) of the Connecticut Act was in effect a price control measure which conflicted with the EPAA and its regulations and was, therefore, preempted by the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2). Because this decision necessarily involved a thorough analysis of the EPAA and the Mandatory Price Regulations, see *Mobil Oil Corp.* v. *Tully, supra,* slip op. at _____, the district judge adjudicated an ESA (EPAA) issue and, therefore, exclusive jurisdiction over this part of the case lies with TECA pursuant to 15 U.S.C. § 754(a) (1). *Id.*

As in *Mobil Oil Corp.* v. *Tully, supra,* however, we hold that this court, and not TECA, has jurisdiction to review the district court's ruling on the defendants-appellants' motion to dismiss pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. Because this question involves a statute plainly not within the EPAA and it is severable and independently appealable, we must deny the appellee's motion to dismiss with respect to the Tax Injunction Act. See *Texaco, Inc.* v. *Department of Energy,* 616 F.2d 1193 (TECA 1979). Review of the lower court's decision not to abstain, however, is properly within the jurisdiction of TECA. TECA has consistently exercised jurisdiction over ancillary threshold issues such as mootness, ripeness, and venue. *See e.g., Quincy Oil, Inc.* v. *Federal Energy Administration,* 620 F.2d 890, 893 (TECA 1980). Although the Tax Injunction Act issue is separate and independent from the EPAA issues, abstention is properly classified as a threshold issue which has no life apart from the substantive claim. *Id.* A decision to abstain in this case would necessarily involve a finding that some possible interpretation of Section 13(b) would render the provision consistent with the federal regulatory framework. Such a finding, however, would necessarily entail some analysis of the federal and state statutes and regulations. Thus, we will defer to TECA's particular expertise in this area.

We therefore hold that the appellees' motion to dismiss is granted with respect to the preemption and abstention issues but denied with respect to the applicability of the Tax Injunction Act.

II.

Having found that this court has jurisdiction over the applicability of the Tax Injunction Act, 28 U.S.C. § 1341, we now hold, as we have held today in *Mobil Oil Corp.* v. *Tully, supra,* that Section 1341 does not bar this action. Section 13(b), the anti-passthrough provision, is not an exercise of the state's taxing power. Rather, in prohibiting the oil companies from raising their posted wholesale rack price in Connecticut by an amount higher than the average price rise by the oil companies

in all other ports on the eastern coast of the United States, Connecticut has created a price control system even more complex than the New York provision in *Mobil Oil Corp.* v. *Tully, supra.* Moreover, as in New York, it was the express purpose of the legislature in enacting Section 13(b) that the tax "[not] be construed as a tax upon the purchasers of petroleum products" and, thus, "such tax shall constitute a part of the operating overhead of such companies." Conn. Act. § 13(a). Finally, it cannot seriously be argued that the judgment of the court below has enjoined, suspended or restrained the assessment, levy or collection of the gross receipts tax. By virtue of Section 15 of the Connecticut Act, the legislature specifically provided that if Section 13(b) or any other section, part or phrase were held to be invalid or unconstitutional the remaining sections of the act would remain in full force and effect. Thus, the Connecticut tax is continuing to accrue and be collected. We therefore hold that the district court was not barred from declaring Section 13(b) to be preempted by the EPAA because these actions did not seek to restrain the assessment, levy or collection of a tax. We do not reach, therefore, the second question under Section 1341 — whether there existed a plain speedy and efficient state remedy in the state courts.

Appeal dismissed with respect to the preemption and abstention issues, affirmed with respect to the inapplicability of the Tax Injunction Act. Any further relief should be sought from TECA.

MOBIL OIL CORP. v.
Tully — 80-7785

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MOBIL OIL CORP., ET AL.	:	
v.	:	CIVIL NO. H-80-359
OREST T. DUBNO, ET AL.	:	
TEXACO, INC.	:	
v.	:	CIVIL NO. H-80-376
CARL R. AJELLO, ET AL.	:	
AMERADA HESS CORP.	:	
v.	:	CIVIL NO. H-80-377
ELLA T. GRASSO, ET AL.	:	

MEMORANDUM OF DECISION

The plaintiffs, in their respective complaints in these three actions, seek declaratory and injunctive relief against the implementation or enforcement of section 13(b) of Public Act 80-71 of the State of Connecticut.[1] A hearing on the plaintiffs' motion for a preliminary injunction was conducted on June 23, 1980. A hearing on the merits was held on June 30, 1980. The cases are thus ripe for final decision.

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[1]The sections of P.A. 80-71 that are relevant to this action are reproduced in an Appendix to this opinion.

I. BACKGROUND

A. The Connecticut Statute

Section 1 of Public Act 80-71 of the 1980 Connecticut General Assembly ("the Act") singles out a narrow group of companies and imposes a two-percent tax on the gross receipts of those companies from their sales in Connecticut. Only a company that is engaged primarily in the *refining and distribution* of *petroleum* products and that distributes such products to wholesale and retail dealers for marketing and distribution in Connecticut must pay the tax. Since there are no petroleum refineries in Connecticut, the restrictions on the application of the tax contained in section 1 effectively limit the tax to integrated petroleum companies engaged in both the refining and distribution of petroleum products in a number of states. In contrast, companies that only distribute petroleum products are not taxed on their receipts from sales in Connecticut.

In the ordinary course of business, the cost of a tax such as the gross receipts tax would be passed along to purchasers in the form of higher prices. In order to avoid the predictable application of the tax burden to Connecticut purchasers, the General Assembly enacted section 13 of the Act.

Section 13(a) contains a general statement of legislative intent: "It is...the intention of the general assembly that the tax imposed under section 1 of this act be construed as a tax upon... and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies." Section 13(a) itself contains no provision respecting the price of petroleum products.

Implementing the intent to have the gross receipts tax treated as an overhead cost, section 13(b) forbids each company subject to the tax to raise its wholesale prices in Connecticut by any amount higher than the average amount by which it raises such prices "in all ports on the eastern coast of the United States." Because of section 13(b), such costs may not be added entirely

to prices in Connecticut, but may be recouped only on a pro rata basis from all customers in the states (including Connecticut) to which petroleum products are distributed from east coast ports.

The pricing provisions of section 13(b) apply only to petroleum products "exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) ["EPAA"]." At the present time, these so-called exempt products include home heating oil, diesel fuel, residual fuel oil, automotive motor oil, industrial oil and greases, and aviation fuel.

The plaintiffs in these three actions are petroleum companies subject to the tax imposed by section 1 of the Act and therefore to the pricing provisions of section 13(b). They will be required by sections 1 and 7 of the Act to file quarterly returns and payments of the tax, which the state anticipates will total approximately $60 million in the next year. This court is not asked to decide whether the imposition of the tax is valid. The companies concede that it is and have indicated their intention to pay that tax when due. They challenge only section 13(b), which restricts their ability to pass through the entire cost of the tax to Connecticut purchasers. Pursuant to section 30 of the Act, section 13(b) became effective on July 1, 1980.

The plaintiffs contend that Connecticut's action is barred by reason of provisions in the federal Constitution and laws. Their primary argument is that section 13(b) is pre-empted by federal regulation and thus cannot stand under the Supremacy Clause of the Constitution.[2] U.S. Const., art. VI, cl. 2. Analysis of this contention requires examination of the federal statutory and regulatory scheme on which the plaintiffs rely, a task to which we now briefly turn.

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[2]Additionally, the plaintiffs argue that section 13(b) unduly burdens interstate commerce in violation of the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, and that it violates the Due Process Clause of the fourteenth amendment.

B. The Federal System for the Pricing of Petroleum Products

When Congress enacted the EPAA, it found that shortages of various petroleum products "constitute[d] a national energy crisis" requiring action by the federal government. 15 U.S.C. § 751(a) (3). To alleviate this crisis in the "national distribution system" for such products, *id.* § 751(b), the Congress authorized the President to promulgate regulations governing the allocation and pricing of crude oil, residual fuel oil, gasoline, kerosene, distillates, LPG, refined lubricating oils, and diesel fuel throughout the United States. *Id.* § 753(a).[3] The Congress specifically instructed the President to keep in view the national scope of the subject to be regulated, requiring that his regulations should provide, to the maximum extent practicable, for the "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at *equitable prices among all regions and areas of the United States....*" *Id.* § 753(b) (1) (F) (emphasis added.)[4]

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[3]Title 15 U.S.C. § 753(a) provides:

> "Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States."

[4]In addition, the President was required to provide, to the maximum extent practicable, for the "minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." 15 U.S.C. § 753(b) (1) (I).

The understanding of Congress that the allocation and pricing of petroleum products is a national problem requiring federal regulation is reflected also in the legislative history of the EPAA. When Senator Henry Jackson, sponsor of Senate Bill 1570, first introduced the bill on April 13, 1973 he underscored the importance of Congress' actions "to build a coordinated and rational fuels and energy policy." 119 Cong. Rec. 12317, *quoted in* S. Rep. No. 93-159, 93d Cong., 1st Sess. 21 (1973). Later, Senator Jackson as floor manager of the bill during the Senate debates urged that one of the reasons that Congress should enact mandatory rather than voluntary measures to address the fuel supply problem was to avoid piecemeal action by the states:

> "Further, if the Federal Government fails to establish effective regional or national allocation plans, we will invite piecemeal action by the States. Our fuel shortage problems are national problems; they must be recognized and resolved at the Federal level."

119 Cong. Rec. 17764 (1973).

In response to the EPAA the President, acting through a series of executive agencies now submerged in the Department of Energy ("DOE"), has promulgated a comprehensive system of regulations governing the allocation and pricing of petroleum products. *See* 10 C.F.R. Parts 210-212. Regulations pursuant to the EPAA were originally issued on December 27, 1973, 39 Fed. Reg. 744 (1974), and were shortly thereafter comprehensively reorganized and revised, 39 Fed. Reg. 1924 (1974). On January 10, 1975, in clarifying its definition of "covered products" which were subject to price regulation under the EPAA, the Federal Energy Administration ("FEA") emphasized its intention to regulate to the full extent of the authority granted under the Act:

> "With respect to 'covered products' (i.e. those products which are subject to FEA price regulations) the intent of the FEO [Federal Energy Office], and now

> the FEA, has always been to exercise its regulatory authority under the [EPAA] with respect to all products that are subject to that Act. Previous definitions of 'covered products' as set forth in the Mandatory Petroleum Price Regulations were in no way intended to restrict the scope of the price regulations to anything less than all the products subject to the [EPAA]."

40 Fed. Reg. 2795 (1975).[5] Accordingly, as of that date "covered products" subject to price regulation under the EPAA included crude oil, residual fuel oil, and "refined petroleum products," such as gasoline, kerosene, fuel oil and other distillates, refined lubricating oils, diesel fuels, propane, and butane. *Id.*[6]

Congress supplemented the EPAA in 1975 by adding 15 U.S.C. § 760a as part of the amendments enacted under the Energy Policy and Conservation Act, P.L. 94-163. That section authorizes the President to amend the EPAA regulations to exempt the allocation and pricing of "crude oil, residual fuel

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[5]"The interpretation of the agency charged with administration of the statute is, of course, entitled to substantial deference." *Quern* v. *Mandley,* 436 U.S. 725, 738 (1978) (citing *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 421 (1973).

[6]The pervasiveness of federal regulation of the allocation and pricing of petroleum products is illustrated by Executive Order No. 12140, 44 Fed. Reg. 31159 (1979), *as amended by* Executive Order No. 12162, 44 Fed. Reg. 56665 (1979), *reprinted at* 15 U.S.C.A. § 754. When gasoline shortages in 1979 created delays and disruptions at retail gasoline outlets, the need for regulation to protect public safety and order was apparent. Ordinarily, problems such as long lines and minor disorders around gasoline stations would have been a matter for state regulation under the police power. But because of the scope of federal regulation under EPAA, the governors of the various states could take action (*e.g.,* the odd-even system, limitations of each customer's purchase, preferences for certain classes of customers) only after authorization by the President in the cited Executive Order.

oil, or any refined petroleum product or refined product category" from the general price and allocation regulations contained in 10 C.F.R. According to section 760a(c) (2), the President must omit any such amendment for congressional approval and must accompany the submission with a statement of his rationale for the amendment. When proposing to exempt a product from price control, the President is required to state to Congress his finding

> "that competition and market forces are adequate to protect consumers and that exempting such oil or refined product category *will not result in inequitable prices for any class of users of such oil or product.*"

15 U.S.C. § 760a(d) (1) (B) (emphasis added). The President must also send to Congress with each proposed amendment his views as to the "potential economic impact" of the proposed exemption, including, where practicable, his views on "the State and regional impacts of such amendment"; "the effects of such amendment on the availability of consumer goods and services; the gross national product; competition"; and "the effects on...consumer prices." *Id.* § 760a(d) (2).[7] After exempting products, the President may revoke such exemptions if he determines that such revocation is necessary to achieve the federal objectives in the area. *Id.* § 760a(f).[8]

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[7]The requirement that exemptions be submitted to Congress lapsed on May 31, 1979. *See* 15 U.S.C. § 760g; 44 Fed. Reg. 19425 (1979).

[8]Title 15 U.S.C. § 760a(f) provides:

> "With respect to any oil or refined product category which is exempted pursuant to the provisions of this section, the President shall have authority at any time thereafter to prescribe a regulation or issue an order respecting either the allocation of amounts, or the specification of price or the manner for determining the price, of any such oil or refined product category upon a determination by him that such regula-

Since June 1, 1976, federal energy authorities have lifted federal price controls on residual fuel oil, 41 Fed. Reg. 13896 (1976); middle distillates, 41 Fed. Reg. 24516-18, 34008 (1976); napthas, gas oils, benzene, greases, lubricated base oil stocks, lubricants, solvents, toluene, unfinished oils, xylene, and other finished products, 41 Fed. Reg. 30096 (1976); aviation fuel, 41 Fed. Reg. 40452 (1976), 44 Fed. Reg. 7070 (1979); and butane and natural gasoline, 44 Fed. Reg. 70118 (1979). Before the exemptions enumerated above went into effect, the actions were submitted to Congress pursuant to 15 U.S.C. § 760a(c) (2), and neither the House nor the Senate disapproved of any of them. The DOE and its predecessor agencies in each instance have made it clear that the price and allocation controls have been converted to standby status, with petroleum product markets subject to continuous monitoring and possible future regulatory action.

This case presents two distinct but related questions with respect to the validity of Connecticut's challenged provision, section 13(b). "The first is whether the statute [ ], viewed independently of federal legislation regulating the [petroleum] industry, burden[s] interstate commerce in a manner contrary to the Commerce Clause." *Lewis* v. *BT Investment Managers, Inc.*, 48 U.S.L.W. 4638, 4640 (U.S. June 9, 1980). The second is whether Congress, by its own legislation in this area, has pre-empted the state's legislation. These two barriers to the state's

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tion or order is necessary to attain, and is consistent with, the objectives specified in section 753(b) (1) of this title. Any such oil or refined product category for which allocation or price requirements are reimposed under authority of this subsection may subsequently be exempted without regard to the provisions of subsection (c) of this section [relating to submissions to Congress]."

action overlap to some extent.[9] The nexus between the enterprises of the plaintiffs and their interstate activities would be sufficient to justify an examination into whether section 13(b) impermissibly burdens interstate commerce. Although not wholly preclusive, the Commerce Clause gives Congress the power to regulate commerce among the states. However, because Congress *has* exercised the commerce power in the field of production, distribution, and pricing of petroleum products, it will be more appropriate to consider first whether the state's action must give way in the face of national legislation, which is "supreme" under article VI of the Constitution.

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> "Certain first principles are no longer in doubt. Whether as inference from congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the *Cooley* case's broad delineation of the areas of state and national power over interstate commerce.... Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce.
>
> "There is no longer any question that Congress can redefine the areas of local and national predominance...despite theoretical inconsistency with the rationale of the Commerce Clause as a limitation in its own right. The words of the Clause — a grant of power — admit of no other result. When Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition; here we are closer to an intent that can be demonstrated with assurance, although we may employ presumptions grounded in experience in doubtful cases."

California v. *Zook,* 336 U.S. 725, 729 (1949) (citations omitted).

II. THE SUPREMACY CLAUSE

The Supremacy Clause declares the law of the United States to be "the supreme Law of the Land..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. In determining whether a state statute is pre-empted by federal law, and thus invalid under the Supremacy Clause, the Supreme Court has established a two-pronged test. "The first inquiry is whether Congress...has prohibited state regulation of the particular aspects of commerce involved," *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) — that is, whether Congress has "sought to occupy the field to the exclusion of the States," *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978). If Congress has occupied the field, "state laws regulating that aspect of commerce must fall," whether or not they are harmonious with the federal sheme. *Jones* v. *Rath Packing Co., supra,* at 525. Second, "[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978). The criterion for determining whether such conflict exists "is firmly established": the court must decide whether the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Jones* v. *Rath Packing Co., supra,* at 526 (quoting *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Although the Supreme Court has attempted various descriptions of the "conflict" required under the second prong of the pre-emption test, it has consistently returned to the formulation enunciated by Mr. Justice Black in *Hines* v. *Davidowitz:* the Court's "primary function is to determine whether, under the circumstances of [the] particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. *Accord, Aronson* v. *Quick Point Pencil Co.,* 440 U.S. 257, 262 (1979); *Ray* v. *Atlantic Richfield Co., supra,* at 158; *Jones* v. *Rath Packing Co., supra,* at 526 (*Hines* test "firmly established"); *DeCanas* v. *Bica,* 424 U.S. 351, 363 (1976); *Perez* v. *Campbell,*

402 U.S. 637, 649-50 (1971). Applying the *Hines* test, the Court has persistently invalidated state legislation that "frustrates the full effectiveness of federal law," *Perez* v. *Campbell, supra,* at 652; that betrays a "general incompatibility with basic federal objectives," *Philadelphia* v. *New Jersey,* 437 U.S. 617, 621 n.4 (1978); or whose "consequences sufficiently injure the objectives of the federal program" to result in "frustration to federal policy." *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 583, 589 (1979). *Cf. White Mountain Apache Tribe* v. *Bracker,* 48 U.S.L.W. 4897, 4901 (U.S. June 27, 1980) (state taxation of non-Indian business operating on reservation lands "would obstruct federal policies" and is pre-empted).

A conflict between state and federal laws may exist despite the absence of literal inconsistency between them. A state regulation will be pre-empted, in other words, not only where federal authorities have promulgated a requirement different from the state's, but where federal authorities have considered the matter and "decided that no such requirement should be imposed at all." *Ray* v. *Atlantic Richfield Co., supra,* at 171-72. The Supreme Court recently reaffirmed that

> "'where failure of...federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation."

Id. at 178 (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.,* 330 U.S. 767, 774 (1947)). If federal authorities have made a considered decision that there should be *no* regulation of a particular subject, in short, *any* state regulation of that subject necessarily conflicts with the federal scheme.

Of course, mere failure to regulate, in and of itself, will rarely constitute an affirmative federal decision that "no such regulation is appropriate or approved" in light of federal policy.

Rather, "[t]he pertinent inquiry [is] whether [federal authorities have] addressed and acted upon the question," whether they have given "careful consideration" to factors specified by Congress, and, after balancing the competing interests, whether they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals. *Ray* v. *Atlantic Richfield Co., supra,* at 174, 177 (holding state vessel-size regulation pre-empted); *National Tank Truck Carriers, Inc.* v. *Burke,* 608 F.2d 819, 824 (1st Cir. 1979) (affirming grant of preliminary injunction against enforcement of state regulation on pre-emption grounds). When federal authorities have taken these steps, it must be assumed that they have thoroughly considered all the arguments in favor of a given type of regulation, yet have concluded, on balance, that the *absence* of regulation will best serve federal objectives.

In sum, a state law will frustrate the full accomplishment of congressional objectives if it directly conflicts with a considered federal determination that a given subject should not be regulated at all. Analysis of the EPAA and its implementing regulations indicates that section 13(b) conflicts in this sense with the federal scheme governing petroleum product pricing.

A. The Federal Regulatory Scheme

1. The EPAA of 1973

The EPAA directed the President to promulgate mandatory regulations governing the price and allocation of all petroleum products. 15 U.S.C. § 753(a). In issuing these regulations, the President was directed to consider nine specific objectives, including "equitable distribution of [petroleum products] at equitable prices," "preservation of an economically sound and competitive petroleum industry," "economic efficiency," and "minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." *Id.* § 753(b) (1) (D), (F), (H), (I). The President, through the authority given him, promptly adopted comprehensive regulations

controlling the price of all petroleum products. 39 Fed. Reg. 1949 (1974).

In the legislative history of the 1973 Act, Congress repeatedly voiced its intention that price controls represent a temporary departure from the free market norm and that they be implemented so as to disrupt the free market as little as possible. The Senate Report, for example, stated that the EPAA

> "emphasizes the objective of minimizing economic distortion, inflexibility and unnecessary interference in market mechanisms. The Committee intends that [price controls] be temporary and limited in scope, and that they not permanently displace the price system as the main tool for allocating resources and products in the petroleum industry. [Section 753(b) (1) (I)] indicates the Committee's preference for price flexibility, competition and decentralized decisionmaking."

S. Rep. No. 93-159, 93d Cong., 1st Sess. 25 (1973). The Conference Report noted that the objective of minimizing market interference "requires special mention":

> "The committee recognizes that [price controls] necessarily distort the economy and interfere with a free market mechanism. It is the intent of this legislation that economic distortion and interference be minimized to the extent practicable. The President should assure himself that his actions interrupt existing supply mechanisms only when necessary to permit the accomplishment of [EPAA] objectives."

H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 24 (1973). *Accord,* H.R. Rep. No. 93-531, 93d Cong., 1st Sess. 19 (1973).

In sum, Congress in 1973 clearly expressed its preference for the free market as the proper determinant of petroleum product prices. It regarded price controls as a necessary but unfortunate — and in all events temporary — departure from that norm.

2. The EPAA Amendments of 1975.

Congress in 1975 added section 12 to the EPAA, 15 U.S.C. § 760a, authorizing the President, by amendment to the regulations, to exempt petroleum products from price controls, and to convert such controls from "mandatory" to "standby" status. *Id.* § 760a(b), (f). Before proposing any exemption, the President is required to determine that "such amendment is consistent with the attainment, to the maximum extent practicable, of [EPAA] objectives...and that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives." *Id.* § 760a(b). Any proposal to exempt a petroleum product from price controls must be supported by findings that "competition and market forces are adequate to protect consumers and that exempting [such product] will not result in inequitable prices for any class of users." *Id.* § 760a(d)(1)(B). The President is required to assess the state and regional impacts of any exemption, as well as its effects on competition, small business, unemployment, consumer prices and the Gross National Product. *Id.* § 760a(d)(2). The President is authorized to reimpose price controls at any time, without congressional approval, if he deems them "necessary to attain [EPAA] objectives." *Id.* § 760a(f).

In the legislative history, Congress emphasized that the President must make two distinct determinations when proposing to exempt a petroleum product from price controls. Under section 760a(b), an exemption is permitted only "(1) if [the President] determines that the amendment is consistent...with the attainment of [EPAA] objectives...and (2) if he *also* determines that the regulation, as amended, provides for the attainment of those objectives to the maximum extent practicable." H.R. Rep. No. 94-340, 94th Cong., 1st Sess. 59 (1975) (emphasis added). The President, in other words, must find *both* that exemption from price controls will not impair realization of national energy goals *and* that the absence of price controls will affirmatively provide for the attainment of those goals in the best possible way.

The legislative history repeatedly confirms Congress' view that exemption from EPAA regulation represents an affirmative federal decision that petroleum product prices be set by the free market. The reports describe the exemption procedure as effecting "a gradual return to an unregulated market," S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 203 (1975), and as "phasing from a regulated to an unregulated market system." H.R. Rep. No. 94-340, at 57. Both houses expressed their intention that gradual price decontrol, subject to the President's power to reimpose controls should future crises arise, would work "a smooth transition of petroleum markets from a controlled state to an uncontrolled status subject only to standby authority." H.R. Rep. No. 94-340, at 58. *Accord,* S. Rep. No. 94-516, at 204.

Congress clearly expressed its preference, moreover, that a petroleum product, once returned to the free market, should remain free of price controls indefinitely. The House Report noted that, under the 1973 EPAA, the President was permitted to propose tempoary 90-day exemptions, after which time price controls would automatically revert. Pub. L. No. 93-159, § 4(g)(2), 87 Stat. 633. This procedure, the Report explained, was inadequate, for

> "potentially grave dislocations could result as an oil or product which had been subject to controls and exempted from those controls, is resubjected to controls. For the conversion to standby authority mechanism to be meaningful, some degree of stability and certainty regarding the status of an oil or product must be assured."

H.R. Rep. No. 94-340, at 57. In enacting the new section 760a exemption procedure, therefore, Congress clearly intended that price controls, once removed, should be reimposed only if the President found it absolutely necessary, lest the "stability and certainty" of petroleum markets be upset to the detriment of EPAA goals.

Congress thus made its intentions perfectly clear when it enacted the present EPAA exemption procedure in 1975. Both in the statute itself and in the legislative history, Congress expressly declared that the exemption of a given petroleum product from price controls would constitute an affirmative federal decision that EPAA objectives required the price of such product to be set by a free market, subject only to standby federal controls.

3. Administrative Implementation of Exemptions.

Pursuant to statute, the President has delegated his authority under the EPAA to the DOE and its predecessor, the FEA. 15 U.S.C. § 754(b); Executive Order 11790, 39 Fed. Reg. 23185 (1974), *as amended by* Executive Order 12038, 43 Fed. Reg. 4957 (1978). Following the procedures outlined in section 760a, those agencies have exempted from price controls all petroleum products except automotive, gasoline, propane, and certain natural gas liquids. 10 C.F.R. §§ 210.35, 212.56-.62. Analysis of these administrative proceedings makes clear that the decision to exempt has in each case "take[n] on the character of a ruling that no such regulation is appropriate or approved pursuant to [EPAA] policy," *Ray* v. *Atlantic Richfield Co., supra,* at 178, and that prices should be set, as Congress envisioned, by the free market. *See* 41 Fed. Reg. 7122-24 (1976) (residual fuel oil); 41 Fed. Reg. 24517 (1976) (middle distillates); 44 Fed. Reg. 7066 (1979) (aviation fuels); 44 Fed. Reg. 70118 (1979) (butane and natural gasoline).

In each case, federal officials explicitly determined (1) that an end to price regulation was *necessary* to achieve EPAA objectives and would affirmatively facilitate the attainment of those objectives to "the maximum extent practicable"; and (2) that petroleum prices should be set by a market free from regulatory constraints. With respect to each exempt product, federal officials "addressed and acted upon the question" of price controls, gave "careful consideration" to the factors specified by Congress, and, after balancing the competing interests, "decided that no such requirement should be imposed at all."

Ray v. *Atlantic Richfield Co., supra,* at 171-72, 174, 177. The exemption decision, in short, has uniformly " 'take[n] on the character of a ruling that no [price] regulation is appropriate or approved pursuant to the policy of the [EPAA].' " *Id.* at 178 (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd., supra,* at 774).

Thus, the petroleum products presently exempt from federal price regulation are not exempt because Congress, the President, and the DOE are no longer concerned with them. Rather, as the history accompanying each amendment makes clear, an unregulated market system has been chosen deliberately as the federal policy for these products. Moreover, this deliberate and continuing federal policy is evident from the authority of the President and his delegates to reimpose direct price regulation, if they determine that the revocation of exemptions becomes necessary to achieve the federal objectives in the area.

B. Section 13(b) Directly Conflicts With the Federal Policy Embodied in the EPAA

Section 13(b) of the Act represents an attempt by Connecticut to regulate the market price of petroleum products and is thus a form of price control.[10] *See Schirtzinger* v. *Dunlop,* 489 F.2d 1307, 1310 (Temp. Emer. Ct. App. 1973) (treating pass-through provisions as price regulation). This price control mechanism operates only on petroleum products "exempt from [the EPAA]." In thus confining the operation of section 13(b),

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[10]It is no answer for the state to contend that section 13(b) merely provides a *method* for recovering the tax paid under section 1. That the plaintiffs can recoup the cost of the tax via the route permitted under section 13(b) does not render that provision any less a price regulation. It distorts market conditions by keeping prices artificially low in Connecticut. At the same time, it encourages an artificial price hike in other states along the eastern seaboard. This is precisely one of the evils that the EPAA sought to combat. *See* note 4 *supra;* note 13 *infra.*

the Connecticut General Assembly may have drawn the inference that federal authorities, by removing price controls from certain petroleum products, intended to permit the states to regulate the price of such products as they saw fit. However, analysis of the EPAA, its legislative history, and its administrative implementation reveals that "exemption" — far from relinquishing petroleum product pricing to state regulation — constitutes an affirmative federal decision that petroleum products should be free from *all* price regulation, and that EPAA objectives will best be served by an unregulated free market subject only to standby federal controls. Section 13(b) is plainly in direct conflict with the federal regulatory scheme outlined above — *i.e.*, it directly conflicts with the federal determination reached by the President and approved by Congress, that such products should be free of price regulation and their prices established by an "unimpeded free market."[11]

Section 13(b) "frustrates the full effectiveness of federal law" in several ways. *Perez* v. *Campbell, supra,* at 652. In 1975, Congress warned of "potentially grave dislocations" that could result if controls exempted from price regulation were "resubjected to controls," stressing that market stability and certainty" were essential to the federal standby regulatory scheme. Section 13(b), by subjecting federally exempt products to a new form of price control, risks just such dislocations. By prohibiting suppliers from raising their prices in Connecticut by more than an arbitrary "average" amount, regardless of supply/demand or cost factors that might call for higher prices in Con-

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[11]The EPAA contains no express provision pre-empting state laws governing petroleum product *pricing. But cf.* 15 U.S.C. § 755(b) (pre-empting state allocation laws that conflict with federal regulations). The Supreme Court has explicitly held, however, that, even if a given state law is not covered by a federal statute's express pre-emption provision, the Court "still must determine whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Jones* v. *Rath Packing Co., supra,* at 540-41, *i.e.*, whether the state law is invalid on "conflict" grounds.

necticut, section 13(b) will create the "artificial market conditions" that FEA labeled "extremely detrimental to the nation." *Findings and Views Concerning the Exemption of Middle Distillates from the Mandatory Petroleum Allocation and Price Regulations* 125 (June 15, 1976). By preventing suppliers from fully recovering, through prices charged in Connecticut, the true economic cost of products sold in Connecticut, section 13(b) will induce suppliers to sell their products in other states, risking the very "supply problems" and "market distortions" that DOE, in removing controls, endeavored to eliminate. Section 13(b), in short, tampers with the "free market" in just the way Congress wished to avoid: it results in "economic inefficiency" and "unnecessary interference with market mechanisms" in flat defiance of the explicit statutory goals of the EPAA.

There can be no doubt that section 13(b) of the Act directly conflicts with the federal energy policy embodied in the EPAA. Because it subjects to price regulation petroleum products that federal authorities have decided should be free of price regulation, section 13(b) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the EPAA. *Hines* v. *Davidowitz, supra,* at 67. Accordingly, under the test for pre-emption enunciated by the Supreme Court, section 13(b) is invalid under the Supremacy Clause.

It is within neither this court's realm nor its competence to evaluate the wisdom of federal energy policy, nor the economic theories that underlie it.[12] Suffice it to say, the question whether the plaintiffs could "afford" to bear alone the tax imposed by section 1 of the Act is irrelevant to the decision in this case, as are arguments proffered by the *amici* who contend

[12]According to those theories, section 13(b)'s price restraints will not deter consumption of energy; at the same time, they will remove incentives to explore for and produce alternative sources of petroleum when the country's need is for larger domestic oil supplies and independence from foreign oil.

that the tax cost could and ordinarily would be spread throughout the several states. All this may be so.[13] But inasmuch as section 13(b) contravenes federal policy by attempting to regulate the price that may be charged in Connecticut for the affected petroleum products, that provision cannot stand.

III. RELIEF

The plaintiffs have asked for both declaratory and injunctive relief against the implementation and enforcement of section 13(b). The irreparable injury required for an injunction, however, could only have been said to exist, if at all, while the plaintiffs awaited a final decision in this action. Moreover, a declaratory judgment will afford the plaintiffs full and complete relief,[14] since "a judgment of this court would probably have

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[13]The latter point, however, is of doubtful validity. In Mobil Petroleum Co., No. FEE-4296 (June 23, 1977), DOE granted Mobil's application for permission to pass on the cost of Guam's gross receipts tax on retail sellers entirely to Guamanian consumers. DOE reasoned that to spread the cost of the tax wherever Mobil does business would be "inequitable" and thus "would frustrate one of the objectives that Congress sought to further in the [EPAA], that of providing for the 'equitable distribution of...refined petroleum products at equitable prices among all regions and areas of the United States.'" *Id.* at 6.

The Connecticut General Assembly was well aware of the Guam decision when it adopted section 13(b). Proceedings of the House of Representatives at 143-44 (Apr. 11, 1980) (remarks of Rep. Emmons); *id.* at 174 (remarks of Rep. Van Norstrand); Proceedings of the Senate at 75-76, 77-78 (remarks of Sen. Johnson). But as the Supreme Court has often recognized in the Commerce Clause context, "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 n.2 (1945) (citations omitted).

[14]Irreparable injury is not a prerequisite to the issuance of declaratory relief. *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 241 (1937).

the same effect upon Connecticut state officials as an injunction." *Arrow Lakes Dairy, Inc.* v. *Gill,* 200 F. Supp. 729, 737 (D. Conn. 1961). Such an injunction, if it later proves to be necessary, may be sought under 28 U.S.C. § 2202. Hence, it is declared that section 13(b) of Connecticut Public Act 80-71 is unconstitutional in that it is pre-empted by federal law and thus violates the Supremacy Clause.[15]

Let judgment enter accordingly. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 9th day of July, 1980.

/s/ M. Joseph Blumenfeld
M. Joseph Blumenfeld
Senior United States District Judge

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[15]The declaratory judgment issued herein does not affect the validity of the tax enacted by section 1 of the Act, since the Act contains a severability clause in section 15.

The fact that a severability clause was included casts doubt on the ingenuousness of the state's argument that the tax was intended by the legislature to be assessed on the plaintiffs themselves. Section 15 makes it evident that the state's primary interest was in the *collection* of the tax. Who would bear the burden was of only secondary significance to the legislature.

Furthermore, Connecticut's tax is not earmarked for any particular purpose whatsoever; its yield goes entirely to the general fund. Even if the court were disposed to undertake a Commerce Clause analysis, it could discern no relationship between section 13(b) and the state's purported interest in safety, health, or the reputable operation of the business carried on by the plaintiffs. The state's suggestion that price restraints are necessary to protect the health of home heating oil users could just as well apply to food, soap, or any other product necessary to consumers' health and safety. And surely that goal does not require regulation of the price of jet fuel, lubrication oil, or the many other products affected by section 13(b).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 482 — September Term, 1980
Argued October 30, 1980 — Decided January 28, 1981
Docket No. 80-7785

MOBIL OIL CORP., ATLANTIC RICHFIELD CO., UNITED REFINING CO., INC., and GULF OIL CO., CHEVRON U.S.A. INC., AMOCO OIL CO., TEXACO INC. and EXXON CORP.,

Plaintiffs-Appellees,

— against —

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

NEW ENGLAND PETROLEUM CORP.,

Plaintiff-Appellee,

— against —

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants.

AMERADA HESS CORP.,

Plaintiff-Appellee,

— against —

JAMES H. TULLY, JR., THOMAS H. LYNCH and FRANCIS KOENIG, Constituting the NEW YORK STATE TAX COMMISSION; ROBERT ABRAMS, Attorney General of the State of New York, and JAMES LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

Before MULLIGAN and VAN GRAAFEILAND, Circuit Judges, and WERKER, District Judge.*

Appeal from an order of the United States District Court for the Northern District of New York, Judge Neal P. McCurn, declaring the anti-passthrough provision of New York State's tax upon the gross receipts of oil companies doing business within the State to be preempted by the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 et seq. and the Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83, and enjoining the enforcement thereof.

Affirmed as to the inapplicability of the Tax Injunction Act, 28 U.S.C. § 1341, dismissed as to the preemption issue.

THOMAS R. TROWBRIDGE, III, New York, N.Y. (Donovan Leisure Newton & Irvine, New York, N.Y.; JOHN M. FREYER, Syracuse, N.Y. (Bond, Schoeneck & King, Syracuse, N.Y., of counsel), for Plaintiffs Mobil Oil Corporation, Atlantic Richfield and United Refining Company.

EDWARD F. GERBER, Syracuse, N.Y. and ARTHUR C. VANGELI and SYDNEY M. AVENT, Bala Cynwyd, Pa., of counsel), for Gulf Oil Corporation.

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*United States District Judge for the Southern District of New York, sitting by designation.

GEORGE WEISZ, New York, N.Y. (Cleary Gottlieb Steen & Hamilton, New York, N.Y., JAMES C. BLAIR, New York, N.Y.; WARNER BOUCK, Albany, N.Y., Bouck Holloway & Kiernan, Albany, N.Y., of counsel) for Plaintiff New England Petroleum.

STANLEY D. ROBINSON, New York, N.Y. (Kaye Scholer Fierman Hays & Handler, New York, N.Y.; WILLIAM L. ALLEN, JR., Syracuse, N.Y., Hancock, Estabrook, Ryan Shove & Hust, Syracuse, N.Y., of counsel) for Plaintiff Amerada Hess Corporation.

EDWARD COSTIKYAN, New York, N.Y. and SIMON H. RIFKIND, New York, N.Y. (Paul Weiss Rifkind Wharton & Garrison, New York, N.Y., of counsel) for Defendants Tully, Lynch and Koenig.

SHIRLEY ADELSON SIEGEL, Albany, N.Y. (Solicitor General, State of New York, of counsel) for Robert Abrams and Defendant LaRocca.

MULLIGAN, Circuit Judge:

On June 18, 1980, New York Governor Hugh Carey signed into law two bills, Senate Bills 10188 and 10261, which created a new Section 182 of the New York Tax Law and established a 2% tax on the "gross receipts" of oil companies doing business in New York. 1980 N.Y. Laws, ch. 271, 272 (N.Y. Act); N.Y. Tax Law § 182 (McKinney Supp. 1980). The express purpose of the tax is to raise additional revenue to aid the State's ailing public transportation system. N.Y. Act, ch. 272 § 1. Indeed, it has been estimated by the New York State Division of the Budget that the new tax would raise an additional 235 million dollars annually. Oil companies were reported to have reaped unjustifiably high profits as a result of market conditions and were therefore deemed to be an appropriate source of revenue. N.Y. Act, ch. 272 § 1. In order to ensure that the oil companies,

and not the consuming public, bore the burden of the tax, the legislature provided in Section 4(12) (a) of the Act (the anti-passthrough provision) that:

> [t]he tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

N.Y. Tax Law § 182(12) (a) (McKinney Supp. 1980). Companies which are found to have passed on the cost of the tax through product pricing are subject to a penalty equal to 100% of the tax liability for the year in which the violation occurs. N.Y. Tax Law § 182(12) (b) (2). In addition, the legislature hinged the viability of the tax itself upon the validity of the anti-passthrough provision. In 1980 N.Y. Laws, ch. 272, § 5 (the self-destruct provision), the legislature provided that:

> [i]f the provisions of [the anti-passthrough section] is [sic]: (i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review; or (ii) held in a formal opinion or ruling issued by the federal Economic Regulatory Administration or any other federal agency of competent jurisdiction to be violative of the provisions of the federal Emergency Price Allocation Act of 1973, as amended, or the federal Mandatory Petroleum Price Regulations (10 CFR 212) promulgated pursuant thereto, or any successor federal law or regulation, and thereby rendered inoperative, and after exhaustion of all appeals therefrom, then, in either of such events, all of the provisions of this act shall cease to be in force and effect [ten days thereafter].

The plaintiffs-appellees, ten oil companies concededly subject to the tax, instituted these actions in the Northern District of New York against the defendants-appellants, New York

State Tax Commission, New York State Attorney General and the Commissioner of the New York State Energy Office, seeking declaratory and injunctive relief. The oil companies argued that the anti-passthrough provision was invalid (a) because it conflicted with the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, et. seq. (EPAA) and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83, issued thereunder and was therefore preempted by the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2); and (b) because it violated the Commerce and Due Process Clauses of the United States Constitution. At no time did the plaintiffs attack the validity of the tax itself. The plaintiffs, after expedited discovery, moved for summary judgment while the defendants moved to dismiss the actions for lack of federal jurisdiction under 28 U.S.C. § 1341, the Tax Injunction Act. By order dated September 4, 1980, the District Court denied the defendants' motion to dismiss and granted summary judgment in favor of the plaintiffs.

In a memorandum and decision dated September 19, 1980, Judge Neal G. McCurn held that the anti-passthrough provision was in effect a price control and not a rule of tax incidence. *Mobil Oil Corp.* v. *Tully,* No. 80-CV-543, slip op. at 10 (N.D.N.Y. September 19, 1980). The court therefore held that the Tax Injunction Act, 28 U.S.C. § 1341 was inapplicable. *Id.* In addition, because the "price control" provision was found to be in conflict with the EPAA and the regulations issued thereunder, Judge McCurn declared that the provision was preempted by federal law with respect to exempt and non-exempt petroleum products. *Id.* at 37, 43. Judgment was entered on September 19, 1980 but on motion by the defendants-appellants, the District Court stayed enforcement until October 31, 1980. *Mobil Oil Corp.* v. *Tully,* No. 80-CV-543 (N.D.N.Y. September 28, 1980). The stay was continued by this court in a ruling from the bench at oral argument on October 30, 1980.

The defendants-appellants appeal from Judge McCurn's order denying their motion to dismiss and granting the plaintiffs-appellees' motion for summary judgment. The appellees

have moved before this court to dismiss the appeal for want of appellate jurisdiction. Arguing that this case "arises under" the EPAA, the appellees' position is that exclusive jurisdiction over all issues in this case is vested in the Temporary Emergency Court of Appeals (TECA) by virtue of Section 5 of the EPAA, 15 U.S.C. § 754(a) (1), which incorporates the review provisions of Section 211(b) (2) of the Economic Stabilization Act. 12 U.S.C.A. § 1904, note (West Supp. 1980). Thus, this case and its companion case was decided today, *Mobil Oil Corp.* v. *Dubno,* No. 80-7677, slip op. _____ (2d Cir.) require an analysis of the appropriate allocation of appellate jurisdiction between a court of appeals and the TECA.

I

The Motion to Dismiss

(a) Preemption

The threshold issue on this appeal is whether this court has jurisdiction to hear it. The appellee oil companies have argued that Section 211(b) (2) of the ESA, 12 U.S.C.A. § 1904, note (West Supp. 1980), provides that the Temporary Emergency Court of Appeals (TECA) has "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [ESA]." Section 5 of the EPAA, 15 U.S.C. § 754(a) (1), incorporates by reference the jurisdictional provisions of § 211 of the ESA where there is judicial review of the regulations promulgated under Section 753(a) of the EPAA (mandatory allocation of crude oil, residual fuel oil and refined petroleum products) as well as any order or action taken by the President or his delegate under the chapter.

In *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.,* 604 F.2d 179 (2d Cir. 1979) we held that a case or controversy arises under the ESA or EPAA where the district court has adjudicated an "ESA issue." (The court used that expression to mean issues involving the ESA and the EPAA as well as regulations promulgated under both statutes. *Id.* at 182 n.3).

The Tenth Circuit has indicated that an ESA issue is one "involving the construction, applicability and effect" of the EPAA, *Mountain Fuel Supply Co.* v. *Johnson,* 586 F.2d 1375, 1382 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979).

The preemption issue presented here does present an EPAA question which was adjudicated in the District Court and is thus within TECA's exclusive appellate jurisdiction. A major contention of the oil companies was that Section 182(12) (a) of the New York Tax Law prohibiting the passthrough of the two percent gross receipts tax was unconstitutional as a state price control rule which conflicted with the EPAA and the provision thus void under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl.2). To make the determination that the state law conflicted with the federal regulations, as Judge McCurn found, necessitates "a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder." *Mobil Oil Corp.* v. *Tully,* supra, slip op. at 6. The trial judge proceeded therefore to analyze in detail the federal statute and regulations to determine whether or not the state law was in conflict with the regulations as well as the congressional scheme and policy. *Id.* at 17-43. Whether that analysis was correct is not properly before this court since in making the analysis the District Court was clearly construing and interpreting the EPAA and its regulations.

The appellants argue that the preemption claims arise under the Constitution rather than the EPAA and thus do not pose an EPAA question. The argument is not persuasive. In *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), the Supreme Court held that the issue of preemption did not involve a substantial constitutional question so as to warrant the convening of a three judge court pursuant to 28 U.S.C. § 2282. The Court declared that the basic question involved in a preemption case "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Id.* at 120. See also *American Federation of Labor* v. *Watson,* 327 U.S. 582 (1946).

This Court has made a similar analysis in *Andrew* v. *Maher*, 525 F.2d 113, 119 (2d Cir. 1975).

> "While [the Supremacy Clause] is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate."

It is obvious that in this case the trial court was obligated to and did make an analysis and interpretation of the two statutory schemes involved here, both state and federal. Having found that an impermissible conflict existed between the anti-passthrough provision and the federal statute, regulations and congressional policy, the finding of preemption was automatic. Appellants further argue that if arguendo the District Court did have exclusive jurisdiction in all suits arising under the EPAA, then it should not have adjudicated that issue but rather it should have followed the statutory mandate of Section 211(c) and made a determination as to whether a substantial constitutional question exists" and if so "certify such issue to [TECA]." While our analysis would indicate that the substantial issue was statutory and regulatory analysis and interpretation rather than constitutional, the short answer to the contention is that the certification issue is a determination to be made by TECA and not this court. *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 716 (TECA), cert. denied, 444 U.S. 879 (1979).

Appellants' further argument that an EPAA question is one limited to cases and controversies involving a regulation promulgated under Section 753(a) and not to all cases or controversies arising under the EPAA itself is at odds with our statutory interpretation in *Coastal States Marketing* v. *New England Petroleum Corp., supra.* Here the District Court did analyze and apply the statute, the regulations and the underlying congressional policy. The District Court further made an adjudication resting on its interpretation of that federal scheme. It therefore decided an EPAA issue sufficient to vest TECA by statu-

tory mandate with exclusive jurisdiction of this appeal on the preemption issue.

(b) The Anti-Injunction Act

The oil company appellees' motion to dismiss the appeals on jurisdictional grounds is also addressed to the second issue on this appeal — that 28 U.S.C. § 1341, the Tax Injunction Act, deprived the District Court of jurisdiction. The appellants argue that the determination of the District Court that 28 U.S.C. § 1341 did not deprive it of jurisdiction was erroneous. The appellees contend, however, that the issue was ancillary to the EPAA question and therefore within TECA's exclusive appellate jurisdiction. We disagree with both arguments.

Section 1341 precludes the district courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." It is apparent that the inquiry of the District Court on this issue did not require any analysis of the EPAA or its regulations. It required solely an interpretation of a state statute to determine whether or not an injunction, suspension or restraint was proscribed by the federal statute. Appellees seemingly recognize this but denominate it as an issue ancillary to the EPAA preemption question and therefore within TECA's exclusive jurisdiction.

In a comparable setting TECA has declined to jurisdiction. In *Texaco, Inc.* v. *Department of Energy,* 616 F.2d 1193 (TECA 1979) TECA declined to accept jurisdiction to review a District Court holding that the Federal Energy Regulatory Commission had review authority under the Department of Energy Organization Act even though the DOE actions which were to be reviewed by the FERC were taken under the EPAA. The court reasoned that since the District Court's only decision was that the FERC had review authority, which was under the DOE Act and not the EPAA, it could not exercise jurisdiction since it involved the interpretation of a statute not within the review

provisions of 15 U.S.C. § 754(a). The court stated, "...TECA has repeatedly refused to exercise jurisdiction over issues or claims not arising under the EPAA even though they may be joined in the same case with other issues or claims that do arise under the EPAA." *Id.* at 1196.

Here the federal statutory prohibition is plainly not within the EPAA and the refusal of TECA to exercise such jurisdiction is reasonably to be anticipated. Obviously, the TECA position can result in bifurcated appeals as it will in this case but that has been anticipated by this court in *Coastal States Marketing* v. *New England Petroleum Corp., supra,* 604 F.2d at 185. It is desirable to defer to a specialized federal appellate court, TECA, with its special expertise on EPAA issues, which in this appeal, includes the preemption question involving analysis of the congressional intent in enacting the EPAA and the interpretation of the regulations adopted pursuant thereto.

The oil companies rely upon several TECA holdings where TECA did take jurisdiction over ancillary non-EPAA issues so that it could "perform...the normal and necessary functions of any court." *Quincy Oil Inc.* v. *Federal Energy Administration,* 620 F.2d 890, 893 (TECA 1980). However, TECA has exclusive jurisdiction only over EPAA issues. *Coastal States, supra,* 604 F.2d at 181. This Court as a court of appeals has concurrent jurisdiction in an appeal from a final order of a District Court over independent issues which do not present an EPAA question. *Id.* at 186. The Section 1341 question is substantial and is independently appealable to this court. The oil company's reliance on *M. Spiegel & Sons Oil Corp.* v. *B.P. Oil Corp.,* 531 F.2d 669 (2d Cir. 1976) is misplaced. That case did involve an appeal from an EPAA question which was within the exclusive jurisdiction of TECA as well as an ancillary issue — an appeal from an interlocutory order of the District Court refusing to transfer the action to another District Court. Our dismissal was based on the proposition that a ruling on a transfer motion is not independently appealable under 28 U.S.C. § 1291(a) (1). In this case the Section 1341 issue is independent and severable

from the EPAA question and presents us with an appealable order from a ifnal order of the District Court.

We conclude therefore that the motion to dismiss the appeal on jurisdictional grounds is granted with respect to the preemption question and denied as to the Section 1341 issue.

II

Having determined that the preemption issue is within the exclusive jurisdiction of TECA and that the applicability of the Tax Injunction Act is properly before this court, we address the latter issue. Section 1341 is brief and facially clear:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The position of the State defendants is essentially that the order of the District Court has effectively restricted the "assessment, levy or collection" of a New York State Tax and is thus within the clear proscription of Section 1341. The oil companies argue that they do not at all challenge the validity of the tax but simply the anti-passthrough provisions which they denominate as an exercise not of the taxing power of the State but rather its police power. The anti-passthrough provision, they urge, is a price fixing statute and not a taxing device. While the statutory linkage between the validity of this provision and the continued existence of the tax does result in the frustration of the State's power to collect the tax, this was the calculated decision of the legislature and not the result of the court's determination. While the briefing and argument on this issue has been intensive, there is no authority precisely in point.

The State appellants argue that Section 182(12) (a) is a state tax law and that the State has the authority to select the target of the tax. They rely upon language in *First Agricultural National Bank* v. *Tax Commission,* 392 U.S. 339, 347-48 (1968)

where the Court held invalid a Massachusetts statute which imposed a sales tax upon a national bank. In the course of its opinion the Court construed the state statute as imposing the legal incidence of the tax upon the purchaser rather than the vendor. The Massachusetts State Court from which the appeal originated had construed the statute to impose the tax on the vendor. In reviewing, the court stated "[t]here can be no doubt from the [express] wording of the statute that the Massachusetts legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling." *Id.* at 348. It is difficult to understand how the State can reasonably construe this language to be helpful here. There was no Section 1341 issue in that case at all — the appeal was not from a district court but a state court. No one questions the right of the State of New York to place the legal incidence of the tax upon the oil companies — but it is an entirely different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product.

As we have indicated the tax purpose of the legislation was to raise funds for the mass transit system. However the purpose of the anti-passthrough provision was not to raise taxes but "to do nothing that will contribute to further increases in the price of petroleum products to (New York) consumers" and "to prevent such gross receipts tax from fueling inflation by prohibiting the passthrough of such tax to the consumers of this state." N.Y. Act, ch. 272, § 1.

This objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products. We agree that the State has the right to place the legal incidence of the tax upon the oil companies; it has selected its target. But in barring the targets of the tax from recovering their costs from the consumer directly or indirectly, the State has gone beyond its taxing powers and has employed its police powers. Whether this is appropriate is not the issue before us; whether it results in a collison with EPAA is for TECA. We simply hold that that action is not insulated from federal scrutiny by section 1341.

section 1341.

The mere fact that the anti-passthrough section is contained in a tax law of the State should not lead to automatic santuary under Section 1341. In *Wells* v. *Malloy,* 510 F.2d 74 (2d Cir. 1975), this court held that a District Court was not prevented from considering the constitutionality of a Vermont Motor Vehicle Tax which provided for the suspension of a motor vehicle license if the owner failed to pay the tax due under the state law. An indigent claimed that such suspension created irreparable and immediate hardship and harm to him in violation of his equal protection rights under the fourteenth amendment. This court found that his attack did not seek a restraint upon the assessment, levy or even the collection of the tax.

That the attack of the oil companies is not on those sections of Section 182 which provide for the assessment, levy or collection of the tax within the prohibition of Section 1341, is bolstered by the statement of James H. Tully, Jr., Commissioner of Taxation and Finance of the State of New York in his affidavit in support of a stay which states in part that the plaintiffs "do not challenge the imposition of the tax, or the rate of the tax, or the allocation formula on the collection of the tax." He further stated that anti-passthrough provision "is all that the court enjoined."

We agree therefore with the District Court that the anti-passthrough provision is not an exercise of the taxing power of the State within Section 1341 but rather of its police powers directed to its express concerns about inflation and rising fuel costs. A constitutional attack under the Supremacy Clause on that aspect of the law is not within Section 1341.

Having so held we need not address the issue of whether or not a plain, speedy and efficient remedy may be made in the courts of this State.

The stay of enforcement is continued by this court and shall continue only until such time as the State can seek a stay from TECA. Any motion for further relief should be directed to that court.